

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

BUTTE ENVIRONMENTAL COUNCIL, )  
Plaintiff, ) 2:08-cv-1316-GEB-CMK  
v. ) ORDER  
UNITED STATES ARMY CORPS OF )  
ENGINEERS; UNITED STATES FISH )  
AND WILDLIFE SERVICE; and City of )  
REDDING, )  
Defendants. )

Pending are cross-motions for summary judgment. Plaintiff Butte Environmental Council ("BEC") seeks summary judgment on its claim that the United States Army Corps of Engineers ("the Corps") violated the Clean Water Act ("CWA") when it issued a Section 404 permit authorizing the Stillwater Business Park development project ("the Project"); and on its claim that the Corps' Environmental Assessment ("EA"), which found the Project would not have a significant impact under the National Environmental Policy Act ("NEPA"), violates NEPA because it contains an inadequate cumulative impacts analysis and the public did not have adequate opportunity to comment on the EA. BEC also seeks summary judgment on its claims that

1 the United States Fish and Wildlife Service ("FWS") violated the  
2 Endangered Species Act ("ESA") by issuing an inadequate Biological  
3 Opinion ("BiOp") for the Project, and on its claim that the Corps  
4 violated that Act when issuing a Section 404 permit authorizing the  
5 Project based on the BiOp. Defendants seek summary judgment on all of  
6 BEC's claims.

7 Background

8 The Project is located in Shasta County, California, and  
9 will impact waters of the United States. The City of Redding ("the  
10 City") is developing the Project in the Stillwater Plains area  
11 southeast of downtown Redding, California ("Stillwater site"). The  
12 Project's stated purpose is to enhance the City's economic stability  
13 by attracting business and industry, thereby improving the quality of  
14 life of unemployed and low-paid residents. The Project will directly  
15 and indirectly affect critical habitats for the vernal pool fairy  
16 shrimp, vernal pool tadpole shrimp, and slender Orcutt grass. Vernal  
17 pool tadpole shrimp are listed as endangered under the ESA, while  
18 vernal pool fairy shrimp and slender Orcutt grass are listed as  
19 threatened under the ESA.

20 In 2003, the City began drafting a joint Environmental  
21 Impact Statement and Environmental Impact Report ("EIS/EIR"). Draft  
22 EIS/EIRs were submitted to the Corps and the Environmental Protection  
23 Agency ("EPA") for comment. On April 18, 2006, the City approved a  
24 Final EIS/EIR for the Project. Thereafter, the City applied to the  
25 Corps for a permit under Section 404(b) of the CWA, as required by  
26 that Act, since the Project involves discharge of fill material into  
27 waters of the United States. The Corps has the authority under the  
28 CWA to issue the permit provided the proposed project does not violate

1 the ESA. See 16 U.S.C. § 1536(a)(2). On December 18, 2006, the Corps  
2 issued a public notice that it would be evaluating the City's permit  
3 application for the Project.

4 The Corps entered into formal consultation with the FWS  
5 under Section 7(a)(2) of the ESA to evaluate whether the project would  
6 be "likely to jeopardize the continued existence of any endangered  
7 species or threatened species or result in the destruction or adverse  
8 modification of habitat of such species which is determined . . . to  
9 be critical . . ." 16 U.S.C. § 1536(a)(2).<sup>1</sup> If the FWS determines  
10 under Section 7 the project is not likely to jeopardize the continued  
11 existence of the species or its critical habitat but may result in the  
12 incidental "take" of threatened or endangered species, it issues an  
13 "Incidental Take Statement" along with a BiOp. See 16 U.S.C. §  
14 1536(b)(4); 50 C.F.R. § 502.14(g)(4).<sup>2</sup> The Incidental Take Statement  
15 must specify "the impact of such incidental taking on the species" and  
16 "reasonable and prudent measures [considered] necessary or appropriate  
17 to minimize such impact . . ." 16 U.S.C. § 1536(b)(4).

18  
19 

---

<sup>1</sup>"The term 'critical habitat' for a threatened or endangered species  
20 means the specific areas . . . occupied by the species . . . found [to  
21 have] physical or biological features [ ] essential to the conservation  
22 of the species and [ ] which may require special management  
23 considerations or protection . . ." 16 U.S.C. § 1532(5)(A).  
24 "Jeopardize the continued existence of" means "to engage in an action  
25 that reasonably would be expected, directly or indirectly, to reduce  
26 appreciably the likelihood of both the survival and recovery of a listed  
27 species . . . by reducing the reproduction, numbers, or distribution of  
28 that species." 50 C.F.R. § 402.02.

29 <sup>2</sup>The BiOp must include a "summary of the information on which the  
30 opinion is based"; "a detailed discussion of the effects of the  
31 [project] on listed species or critical habitat"; and "[FWS's] opinion  
32 on whether the action is [or is not] likely to jeopardize the continued  
33 existence of a listed species or result in the destruction or adverse  
34 modification of critical habitat." 50 C.F.R. § 502.14(h)(1)-(3). See  
35 also NRDC v. Rodgers, 381 F. Supp. 2d 1212, 1224 (E.D. Cal. 2005).

1 On December 27, 2006, the FWS issued a BiOp and Incidental  
2 Take Statement for the Project, in which it concluded the Project  
3 would not jeopardize the continued existence of, or adversely modify  
4 or destroy the critical habitat for the vernal pool fairy shrimp,  
5 vernal pool tadpole shrimp, and/or slender Orcutt grass. The FWS  
6 imposed several mitigation conditions upon the Incidental Take  
7 Statement to ensure that the City would to compensate for the critical  
8 habitat loss. The Corps relied on the FWS's BiOp in determining that  
9 the proposed Project complied with the ESA.

10 On August 9, 2007, the Corps issued an EA and Finding of No  
11 Significant Impact ("FONSI") under NEPA, which was included in the  
12 "Department of the Army Permit and Evaluation and Decision Document"  
13 ("Decision Document").<sup>3</sup> On August 21, 2007, the Corps granted a  
14

---

15 <sup>3</sup>NEPA "is our basic national charter for protection of the  
16 environment." 40 C.F.R. § 1500.1(a). It is a procedural statute that  
17 requires the Federal agencies to assess the environmental consequences  
18 of their actions before those actions are undertaken. For "major federal  
19 actions significantly affecting the quality of the human environment,"  
20 42 U.S.C. § 4332(2)(C), the agency is required to prepare an  
21 environmental impact statement ("EIS"). An EIS is a thorough analysis of  
22 the potential environmental impacts that "provide[s] full and fair  
23 discussion of significant environmental impacts and . . . inform[s]  
24 decisionmakers and the public of the reasonable alternatives which would  
25 avoid or minimize adverse impacts or enhance the quality of the human  
26 environment." 40 C.F.R. § 1502.1.

27 Where an agency is unsure whether an action is likely to have  
28 "significant" environmental effects, it may prepare an EA: a "concise  
29 public document" designed to "briefly provide sufficient evidence and  
30 analysis for determining whether to prepare an environmental impact  
31 statement . . . ." 40 C.F.R. § 1508.9. If the EA concludes that the  
32 action will not have a significant effect on the environment, the agency  
33 may issue a Finding of No Significant Impact and may then proceed with  
34 the action. 40 C.F.R. § 1508.13. That is the route taken by the [Corps]  
35 for the [Project] at issue here. . . Klamath-Siskiyou Wildlands Ctr. v.  
BLM, 387 F.3d 989, 993 (9th Cir. 2004) (internal citations omitted).

1 permit to the City under Section 404 which was also based on the  
2 Decision Document.

3 Standard of Review

4 "Judicial review of administrative decisions under the [CWA,  
5 ESA, and NEPA] is governed by the [Administrative Procedure Act  
6 ("APA")]. Under the APA, a court may set aside an agency action if  
7 the court determines that the action was 'arbitrary, capricious, an  
8 abuse of discretion, or otherwise not in accordance with the law.'"

9 W. Watersheds Project v. Matejko, 468 F.3d 1099, 1107 (9th Cir.  
10 2006) (internal citations omitted). "In making this inquiry, [the  
11 court] ask[s] whether the agency considered the relevant factors and  
12 articulated a rational connection between the facts found and the  
13 choice made." Natural Resources Defense Council v. United States DOI,  
14 113 F.3d 1121, 1124 (9th Cir. 1997) (internal citations and quotations  
15 omitted).

16 "Review under the arbitrary and capricious standard is  
17 deferential" to the agency. National Ass'n of Homebuilders v.  
18 Defenders of Wildlife, 127 S.Ct. 2518, 2529 (2007). A reviewing court  
19 should not vacate an agency's decision unless the agency: "has relied  
20 on factors which Congress has not intended it to consider, entirely  
21 failed to consider an important aspect of the problem, offered an  
22 explanation for its decision that runs counter to the evidence before  
23 the agency, or is so implausible that it could not be ascribed to a  
24 difference in view or the product of agency expertise." Id. at 2529-  
25 2530 (internal citation omitted).

26 / / /

27 / / /

28 / / /

## Analysis

## Clean Water Act Claim

BEC argues it is entitled to summary judgment on its CWA claim since the Corps failed to adequately consider practicable alternatives to the Stillwater site before it issued the Section 404 permit. (Pl. Mot. at 14:14-19.) When evaluating a Section 404 permit application, the Corps must consider "the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposal." 33 C.F.R. § 320.4(a)(2)(i).

40 C.F.R. § 230.10(a) provides that no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. A practicable alternative is one that is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. In evaluating whether a given alternative site is practicable, the Corps may legitimately consider such facts as cost to the applicant and logistics. In addition, the Corps has a duty to consider the applicant's purpose. Where a proposed project does not require access to water, i.e., it is not "water dependent," the availability of practicable alternatives is presumed." 40 C.F.R. § 230.10(a)(3).

Bering Strait Citizens for Responsible Res. Dev. v. United States Army Corps of Eng'rs, 524 F.3d 938, 947 (9th Cir. 2008) (internal quotations and citations omitted).

The Project is not water dependent. The Decision Document states, "The basic purpose [of the Project] is economic development which is not water dependent." (Administrative Record ("AR") 545); Pl. Mot. at 13:15-16; Ds. Mot. at 13:15-16.) Therefore, it is presumed practicable alternatives to the Stillwater site exist. BEC

1 contends the Corps has not overcome this presumption, arguing the  
2 Corps did not adequately address concerns raised by the Corps itself  
3 and the EPA before selecting the Stillwater site as the "least  
4 environmentally damaging practicable alternative" ("LEDPA"). (Id. at  
5 19-20:26-5.)

6 BEC cites to letters in the Administrative Record sent by  
7 the EPA and the Corps, in which the EPA and the Corps raise concerns  
8 about the Stillwater site as the LEDPA. (AR 1413, 911, 1414, 3112,  
9 2205, 1426, 3115.) On April 29, 2005, the Corps sent a letter to the  
10 City commenting on the City's Draft EIS/EIR. (AR 3154-3155.) The  
11 letter stated:

12 [Y]our preferred alternative [the Stillwater site]  
13 does not appear to be the LEDPA, as there may be  
14 less environmentally damaging alternatives for  
15 this project. The range of alternatives  
16 considered practicable in your Draft [EIS/EIR]  
17 does not include alternatives that avoid impacts  
18 to waters of the U.S., including wetlands,  
(waters) to the maximum extent possible. . . The  
screening criteria used for selecting practicable  
alternatives is still too restrictive to determine  
LEDPA and eliminates reasonable alternatives such  
as alternative 4. (Id.)

19 On June 23, 2005, the EPA also sent a letter to the City commenting on  
20 the Draft EIS/EIR:

21 We recognize the efforts the City has made with  
22 refinements to their preferred [a]lternative[,]  
[the Stillwater site,] to minimize impacts to on-  
23 site aquatic resources. However, as we have  
discussed in writing and at our meetings,  
24 secondary and cumulative off-site impacts from the  
project remain of significant concern to us when  
considering this alternative. (AR 3112.)

25 The Corps counters it adequately considered practicable  
26 alternatives to the Stillwater site and addressed its own comments and  
27 those from the EPA regarding the Stillwater site. (Ds. Mot. at 13:7-  
28 13.) The Corps argues it "balanced the need to look at a reasonable

1 range of alternatives along with the applicant's [purpose].” (Ds.  
2 Mot. at 14:2-3.) “In evaluating whether a given alternative site is  
3 practicable, the Corps may legitimately consider such facts as cost to  
4 the applicant and logistics. In addition, the Corps has a duty to  
5 consider the applicant's purpose.” Sylvester v. U.S. Army Corps of  
6 Engineers, 882 F.2d 407, 409 (9th Cir. 1989). The Corps argues that  
7 in considering the Project's purpose, the Stillwater site emerged as  
8 the LEDPA.

9 Further, the Corps cites to the Administrative Record as  
10 demonstrative that it's own independent evaluation of the Project's  
11 purpose led to modification of the City's original proposed purpose.  
12 In 2003, the City stated, in a draft statement of the “Basic and  
13 Overall Project Purposes,” “The City of Redding has a need to develop  
14 a business park that is capable of accommodating diverse  
15 manufacturing, wholesale, food processing, information processing,  
16 product distribution, and air cargo users.” (AR 3649.) However, the  
17 Corps stated in its Decision Document that the Project's purpose is  
18 “to construct a medium to large sized regional business park with  
19 associated roads, utilities and infrastructure within the City of  
20 Redding's sphere of influence.” (AR 545.) The Administrative Record  
21 reflects this modification was a result of extensive communication  
22 between the Corps, the EPA, and the City. (AR 3647-3656; 3491-3510;  
23 3522-3524.

24 The Corps argues it carefully evaluated and eliminated the  
25 City's twelve proposed alternatives and a site it independently  
26 selected. (Ds. Mot. at 14:10-18.) During its consideration of the  
27 Project, the Corps evaluated a site that was not included in the  
28 City's permit application, the Mitchell site. (Id. 13:12-13.) The

1 Decision Document explains, "the City could not justify the [12  
2 million dollar] cost of the Mitchell Project" in 2006. (AR 546.)  
3 Further, "[t]he amount of property available [at the Mitchell site  
4 was] too small to achieve the overall project purpose." (Id.) This  
5 finding is substantiated by evidence in the Administrative Record;  
6 specifically on March 26, 2007, Nancy Haley ("Haley"), the Corps'  
7 Project Manager, sent an email explaining, "We are going to throw  
8 Mitchell out on cost and likely the fact that the park would be  
9 disjoined, therefore not feasible practically." (AR 2005.)

10 The Administrative Record further shows several of the  
11 City's proposed sites were eliminated because they failed to meet the  
12 requisite criteria. As the Decision Document explains:

13 Six parcels were eliminated [ ] because they  
14 failed to meet one or more of 3 criteria. The  
15 sites initially needed to be within the City of  
16 Redding or within the Sphere of Influence; have  
17 the ability to be competitive with other cities  
and counties to attract diverse businesses and  
industrial users; and have the ability to  
accommodate numerous businesses without displacing  
existing businesses and residences. (AR 546.)

18 The Draft EIS/EIR prepared by the City in February 2005 explains how  
19 each of these sites did not meet one of the initial screening  
20 criteria. (AR 675-680.) The Decision Document further explains that  
21 five alternatives were eliminated for one of the following reasons:  
22 (1) the site was not available for acquisition; (2) the site may have  
23 resulted in adverse social or economic impacts on existing  
24 development;<sup>4</sup> (3) the site could not accommodate potential multiple

---

25  
26 <sup>4</sup>The February 15, 2005 Draft EIS/EIR provides the following example  
27 of an adverse social or economic effect on existing development: "The  
28 placement of a distribution center which operate[s] 24-hours per day  
adjacent to an existing single family residential development could  
result in potentially significant ambient noise increases, stationary  
(continued...)

1 lot sizes; (4) the site was not capable of being served by the cities' 2 utilities; and/or (5) the site likely entailed unreasonable 3 development costs, meaning the costs exceeded the market value of the 4 developed property. (AR 547; 681-689.) The remaining alternative was 5 eliminated because it posed greater risks to wetland areas and 6 threatened or endangered species. (AR 547.)

7 Additionally, the Corps cites to evidence in the 8 Administrative Record controverting BEC's argument that the Corps did 9 not adequately consider its own concerns, as well as those raised by 10 the EPA. The Corps argues that not only did it modify the project's 11 purpose, thereby eliminating its own concerns that the City's proposed 12 purpose was too restrictive, it also eliminated "alternative 4" for 13 valid reasons, thereby addressing concerns raised in its April 29, 14 2005 letter. (AR 3154-3155.) In the City's Final EIS/EIR, dated 15 February 8, 2006, it explained alternative 4 was eliminated because 16 "[the] site is not practicable." The City's "Preliminary 404(b) (1) 17 Alternatives Analysis," prepared in November 2006, further explains 18 that because 8,300 feet of a tributary to Stillwater Creek ran through 19 the center of the alternative 4 site, that tributary would need to be 20 filled in order to accommodate a contiguous 100 acre site. (AR 2689- 21 2690.)

22 Further, the Corps cites to the Administrative Record as 23 demonstrative that the EPA's and it's own concerns were addressed, 24 specifically by comparing how the original plan was modified in 25

---

26 <sup>4</sup>(...continued)  
27 exhaust emissions while truck[s] are 'warming-up' and idling, glare from  
28 parking lot lights, potential conflicts with automobile traffic, and  
potential aesthetic impacts. These impacts could affect property  
values, and general health and safety." (AR 681.)

1 response to these concerns. In a Supplemental Draft EIS/EIR, issued  
2 on September 16, 2005, the City details revisions made to the February  
3 2005 Draft EIS/EIR which address the comments made by the EPA and the  
4 Corps in April and June 2005. (AR 1327; 3154-3112.) These onsite  
5 revisions included:

6 [R]econfiguring areas and illustrative lots where  
7 development is permitted [ ] to site hydrology,  
8 hydrological connectivity, sensitive listed  
9 species, habitat quality and other biological  
10 related resources; eliminating road connections to  
11 the east; reducing the lengths of trails through  
12 wetland complexes; moving the 115kV electrical  
13 transmission line along the main road or into  
14 areas of less sensitivity; using stormwater BMP's  
15 to minimize impacts to receiving waters from the  
16 Project area; preventing development site run-off  
17 from entering the existing horseshoe pond; and,  
18 creating an easement or other land use restriction  
19 along the northern and eastern boundaries to  
20 prevent any infrastructure or development  
21 connectivity to the north and east. (AR 1314.)

22 Additionally, the Corps' cites to direct impact tables showing that  
23 consultations between the Corps and the City led to a reduction of  
24 direct impacts by 0.83 acres between February and March of 2007. (AR  
25 2013-2041, 2042-2070, 2012, 2172.)

26 " [T]he record reflects [ ] the Corps made the proper  
27 analysis and weighed the correct factors in making its determination  
28 that no feasible alternatives [to the Stillwater site] existed. The  
29 Corps did not err by taking [ ] costs into account. The regulations  
30 explicitly charge the Corps with taking cost, existing technology and  
31 logistics in light of overall project purposes. 40 C.F.R. §  
32 230.10(a)(2)." Friends of Earth v. Hintz, 800 F.2d 822, 833 (9th Cir.  
33 1986) (upholding the District Court's determination that the Corps'  
34 practicable alternatives analysis was proper; and further, affirming  
35 the Corps' decision to eliminate four proposed site alternatives).

1 Therefore, the Corps was neither arbitrary nor capricious when  
2 "rationally conclud[ing]" the Stillwater site was the LEDPA. Id. at  
3 834. Accordingly, this portion of Defendants' cross-motion is  
4 granted.

5 Endangered Species Act Claim

6 BEC seeks summary judgment of its ESA claim, arguing FWS's  
7 determination in the BiOp that there would not be adverse modification  
8 to critical habitat was arbitrary and capricious. (Pl. Mot. at 28:4-  
9.)<sup>5</sup> "[The court's] review [of a BiOp] is 'narrow' but 'searching and  
10 careful,' and [ ] must ensure that the FWS's decisions are based on a  
11 consideration of relevant factors and [ ] assess whether there has  
12 been a clear error of judgment. The FWS must state a rational  
13 connection between the facts found and the decision made." Gifford  
14 Pinchot Task Force v. United States Fish & Wildlife Serv., 378 F.3d  
15 1059, 1065 (9th Cir. 2004) (internal citations omitted).

16 FWS's BiOp concluded "that the proposed [P]roject would not  
17 result in the adverse modification or destruction of critical habitat  
18 for vernal pool fairy shrimp, vernal pool tadpole shrimp, or slender  
19 Orcutt grass." (BiOp at 29.) BEC challenges this finding, citing to  
20 language in the BiOp's conclusion indicating that the Project would  
21 result in adverse modification to the respective critical habitats:

22 However, the proposed project would contribute to  
23 a local and range-wide trend of habitat loss and  
24 degradation, the principal reasons that the valley  
25 elderberry longhorn beetle, vernal pool fairy  
shrimp, vernal pool tadpole shrimp, and slender  
Orcutt grass were federally-listed. The proposed  
project will contribute to the fragmentation and

---

27 <sup>5</sup>At oral argument on December 15, 2008, Plaintiff stated it was only  
28 challenging the "adverse modification" finding of the BiOp and not the  
"no jeopardy" finding; accordingly, only FWS's "adverse modification"  
finding is addressed.

1 reduction of the acreage of the remaining listed  
2 vernal pool species habitat located in critical  
3 habitat, the Redding Core Recovery Area, and  
throughout the range of these federally-listed  
species.

4 The proposed project would also directly and  
5 indirectly affect hundreds of acres of upland  
habitat that supports the aquatic habitat that is  
6 required for the survival of the three vernal pool  
species addressed in this biological opinion.

7 (BiOp at 30.) BEC argues this concluding language bears no rational  
8 connection to the BiOp's ultimate conclusion. (Pl. Mot. at 26-27.)

9 BEC further cites to the BiOp's findings on the Project's  
10 impacts on critical habitat. (Pl. Mot. at 26.) The BiOp found the  
11 Project would result in the destruction of 234.5 acres, 5.4%, of  
12 vernal pool crustaceans in units 1 and 5 of protected vernal pool  
13 crustacean critical habitat. (BiOp at 27.) Further, the BiOp found  
14 the Project would result in the destruction of 242.2 acres, 3.7%, of  
15 unit 2 of protected slender Orcutt grass critical habitat. (BiOp at  
16 28.) Additionally, the Project would destroy 356.6 acres of vernal  
17 pool crustacean critical habitat uplands and 242.2 acres of slender  
18 Orcutt grass critical habitat uplands. (Id. at 27-28.)

19 Defendants rejoin the FWS's determination that the Project  
20 would not adversely modify critical habitat for the respective species  
21 was reasonable and seek summary judgment on BEC's ESA claim. (Ds.  
22 Mot. at 27:15-19.) Defendants argue FWS reasonably relied upon  
23 mitigation measures to be imposed upon the City when making its no  
24 adverse modification determination. (Ds. Mot. at 22:1-2.) The BiOp  
25 contains proposed conservation measures for the vernal pool fairy  
26 shrimp, vernal pool tadpole shrimp, the slender Orcutt grass, and  
27 their critical habitat. (BiOp at 10-12.) Preservation would occur at  
28 both on and off site locations and would range in preservation ratios

1 from 1:1 to 4:1 (Id.) The Incidental Take Statement's "Terms and  
2 Conditions" require the City to adhere to the BiOp's conservation  
3 measures and also imposes several conservation measures prior to the  
4 Project's start. (BiOp at 32-33.)

5 In Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944,  
6 956 (9th Cir. 2003), the Ninth Circuit held:

7 If a Conservation Agreement is in place, then the  
8 reviewing agencies ought to consider it when  
9 evaluating the impact of the proposed action. It  
10 is also relevant to know that the Agreement  
11 imposes enforceable obligations on the parties, to  
12 assure that the proposed mitigation measures will  
13 actually be implemented. Accordingly, it was  
14 proper for the Forest Service and Fish & Wildlife  
15 to consider the Conservation Agreement when  
16 evaluating the Stimson Project.

17 Therefore, under the ESA, it is reasonable for FWS to take into  
18 consideration mitigation measures when making a "no adverse  
19 modification" determination. Even though the Administrative Record  
20 "makes it clear" that there will be negative impacts on critical  
21 habitat, "[t]he same record [ ] evaluates in some detail the ways in  
22 which these impacts will be mitigated by compensation measures. . ."

23 Hayward Area Planning Association, 2004 WL 724950 \*7 (N.D. Cal.  
24 2004) (holding the "dedication of 1,197 acres for the preservation and  
25 management of whipsnake critical habitat for the benefit of the  
26 whipsnake and frog" was rationally taken into account by FWS in  
27 determining there was no adverse modification of critical habitat in  
28 its BiOp). Additionally, the Administrative Record shows the  
enforceable mitigation is "rationally related to the level of take  
under the plan" as required under 16 U.S.C. § 1539(a)(2)(B)(ii).

Nat'l Wildlife Fed'n v. Norton, 306 F. Supp. 2d 920, 928 (E.D. Cal.  
2004). The Incidental Take Statement issued by the FWS in this case

1 "imposes enforceable obligations on the parties, to assure that the  
2 proposed mitigation measures will actually be implemented." Selkirk,  
3 336 F.3d at 956.

4 Defendants further argue that the FWS reasonably based its  
5 "no adverse modification" determination on the entire critical habitat  
6 for the respective species. (Ds. Mot. at 26-27:22-5.) The BiOp, in  
7 analyzing the status of the respective species, states there are 35  
8 critical habitat units designated for vernal pool fairy shrimp,  
9 totaling 597,821 acres; 18 critical habitat units designated for  
10 vernal tadpole shrimp, totaling 228,785 acres; and six critical  
11 habitat units designated for slender Orcutt grass, totaling 94,213  
12 acres. (BiOp at 16, 19.) The ESA Section 7 Consultation Handbook  
13 states:

14 Adverse effects on individuals of a species or  
15 constituent elements or segments of critical  
16 habitat generally do not result in jeopardy or  
17 adverse modification determinations unless that  
18 loss, when added to the environmental baseline, is  
19 likely to result in significant adverse effects  
throughout the species entire range, or  
appreciably diminish the capability of critical  
habitats to satisfy essential requirements of the  
species.

20 See also Gifford Pinchot Task Force v. United States Fish & Wildlife  
21 Serv., 378 F.3d 1059, 1075 (9th Cir. 2004) (stating "The BiOps  
22 considered the important local effects, analyzing critical habitat  
23 more broadly when individual effects were not important").

24 In light of the enforceable mitigation measures and the  
25 permissible broader analysis of critical habitat, the BiOp does state  
26 a "rational connection between the facts found and the conclusion  
27 reached." Id. at 1065. Accordingly, this portion of Defendants'  
28 cross-motion is granted.

1

2 National Environmental Policy Act Claim

3 BEC argues it is entitled to summary judgment on its NEPA  
4 claim since the Corps failed to take a "hard look" at the cumulative  
5 impacts of the Project on critical habitat of the threatened and  
6 endangered species involved in this litigation. (Pl. Mot. at 31:4-  
7 10.)

8 Courts apply a "rule of reason" standard in  
9 reviewing the adequacy of a NEPA document.  
10 Through the NEPA process, federal agencies must  
11 "carefully consider[] detailed information  
12 concerning significant environmental impacts," but  
13 they are "not require[d] to do the impractical."  
14 Alternatively phrased, the task is to ensure that  
15 the agency has taken a "hard look" at the  
16 potential environmental consequences of the  
17 proposed action.

18 Klamath-Siskiyou Wildlands Ctr. v. BLM, 387 F.3d 989, 993 (9th Cir.  
19 2004) (internal citations omitted).

20 BEC argues the cumulative impacts analysis contained in the  
21 EA was not thorough enough and did not adequately address previous  
22 concerns raised by the EPA with respect to the cumulative impacts  
23 analysis. (Pl. Mot. at 30-31.) The Decision Document cites to and  
24 relies upon the cumulative impacts analysis from the City's EIS/EIRs;  
25 and incorporates by reference the February 15, 2005 draft EIS/EIR; the  
26 September 16, 2005 supplemental draft EIS/EIR; and the April 2006  
27 final EIS/EIR. (AR 557-558; 544.) BEC cites to a November 14, 2005  
28 letter from the EPA, in which the EPA raises concerns about a draft  
EIS/EIR's cumulative impacts analysis. (AR 1430; Pl. Mot. at 30:8-  
12.) The pertinent comments are as follows:

Finally, in our previous discussions with the City  
and in our comments on the [Draft EIS/EIR], EPA  
expressed the importance of a substantive-  
cumulative impacts analysis for the proposed

1 project stemming from past and reasonably  
2 foreseeable development projects in Shasta County  
3 which will collectively impact important natural  
4 communities. Although the supplemental [Draft  
5 EIS/EIR] includes additional information on other  
6 projects in the area, the document does not  
7 justify the determination that there would be no  
8 cumulative impacts to groundwater, surface water,  
9 habitat or air quality, as a result of these  
10 developments. (AR 1430.)

11 BEC argues the Final EIS/EIR did not address the EPA's concerns which  
12 were raised in this letter. (Pl. Mot. at 30:15-19.)

13 The Corps counters the City's Final EIS/EIR did address the  
14 EPA's concerns about its cumulative impacts analysis. (Ds. Mot. at  
15 29:13-15.) Later drafts and supplements to the EIS/EIR included a  
16 comprehensive table of projects in the area which would be expected to  
17 contribute to the cumulative impacts of the Project. (AR 1473-1474.)  
18 Modifications were also made to the site as evidenced by the City's  
19 changes to the Project:

20 [The Project site,] as modified, will no longer be  
21 hydrologically connected to the Stillwater Plains  
22 Mitigation Bank which would preclude hydrologic  
23 impacts from occurring. The Proposed Action also  
24 includes a measure to ensure that development in  
25 the Stillwater Plains ecosystem will not occur as  
26 a result of the Project by creating easements that  
27 prevent the extension of infrastructure to the  
28 north, east, and southeast. . . As identified in  
the [supplemental draft EIS/EIR,] the Project will  
create buffers that preclude development from  
extending northward or eastward into the  
Stillwater Plains Conservation Area. (AR 1453-  
1454.)

29 Additionally, the Corps cites to the Administrative Record as  
30 demonstrative that it independently advised the City on its cumulative  
31 impacts analysis, further satisfying the requirement to take a "hard  
32 look" at the cumulative impacts of the Project. (Ds. Mot. at 30:15-  
33 19.) On September 29, 2005, Jonathan Foster, a Corps' employee, sent  
34 an email to the City commenting on the September 16, 2005 supplemental

1 draft EIS/EIR. (AR 1436-1436.) This email provided guidance to the  
2 City on how to analyze the Project's potential cumulative impacts.  
3 (Id.) In a June 2007 letter, Haley further explained the Corps was  
4 considering the cumulative impacts of "reasonably foreseeable"  
5 projects. (AR 1768-1769.)

6 The Administrative Record shows the Corps took the requisite  
7 hard look at the cumulative impacts before issuance of the EA and  
8 FONSI. BEC has not met its burden to show that the Corps' actions  
9 with respect to cumulative impacts were "arbitrary and capricious."  
10 See Inland Empire Pub. Lands Council v. United States Forest Serv., 88  
11 F.3d 754, 764 (9th Cir. 1996) (stating "Plaintiffs have advanced no  
12 proof why this decision is arbitrary and capricious, as is their  
13 burden"). Therefore, this portion of Defendants' cross-motion is  
14 granted.

15 BEC also seeks summary judgment on its NEPA claim contending  
16 the Corps failed to provide the public with notice and an opportunity  
17 to comment directly on the EA and FONSI prior to the Corps' issuance  
18 of these findings. However, as the Ninth Circuit recently held:

19 [T]he circulation of a draft EA is not required in  
20 every case. We do not say that it is always  
21 required or that it is never required. Instead,  
22 we stress that the regulations governing public  
23 involvement in the preparation of EAs are general  
24 in approach, see 40 C.F.R. § 1506.6, requiring the  
25 circulation of a draft EA in every case would  
26 apply a level of particularity to the EA process  
27 that is foreign to the regulations. Also,  
28 requiring the circulation of a draft EA in every  
case could require the reversal of permitting  
decisions where a draft EA was not circulated even  
though the permitting agency actively sought and  
achieved public participation through other means.  
The regulations do not compel such formality. See  
40 C.F.R. § 1508.9. . . .

"The way in which the information is provided is  
less important than that a sufficient amount of  
environmental information--as much as

1 practicable--be provided so that a member of the  
2 public can weigh in on the significant decisions  
3 that the agency will make in preparing the EA."  
4 Stated another way, we now adopt this rule: An  
5 agency, when preparing an EA, must provide the  
6 public with sufficient environmental information,  
7 considered in the totality of circumstances, to  
8 permit members of the public to weigh in with  
9 their views and thus inform the agency  
10 decision-making process.

11 Bering Strait Citizens for Responsible Res. Dev. v. United States Army  
12 Corps of Eng'rs, 524 F.3d 938, 953 (9th Cir. 2008) (citing Sierra Nev.  
13 Forest Prot. Campaign v. Weingardt, 376 F. Supp. 2d 984, 991-992 (E.D.  
14 Cal. 2005).

15 The Administrative Record shows the public had opportunities  
16 throughout 2001-2007, the time period within which the Corps and City  
17 were evaluating the Project, to "weigh in with their views." Bering,  
18 524 F.3d at 953. The Administrative Record shows public meetings were  
19 held on the following dates: April 4 2001; August 12, 2003; June 2,  
20 2004; October 26, 2005; October 24, 2005; April 11, 2006; and April  
21 18, 2006. (AR 2917.) Further, on December 18, 2006, the Corps  
22 solicited public input through a Public Notice "advising all  
23 interested parties of the proposed activity" for which the Permit was  
24 sought; and further, requesting comments be submitted by January 16,  
25 2007. (AR 1646.) The Corps received three letters in response to the  
Public Notice, including a letter from BEC. (AR 2224-2229.) These  
letters were addressed in the Decision Document. (AR 562-566.) In a  
June 7, 2007 letter, sent in response to an inquiry regarding public  
meetings, Haley explained:

26 The City of Redding held several public hearing[s]  
27 for this project between April 2001 and April 2006  
28 . . . In this instance, because so many public  
hearings were already held for this project and  
because the level of impacts to waters of the  
United States, including wetlands, were so minimal

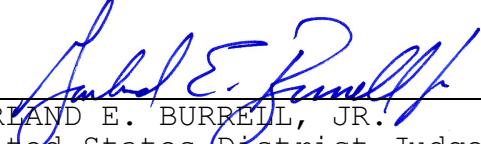
1 in light of the acres of wetlands preserved on the  
2 site, the Corps determined no hearing was  
3 necessary. (AR 1769.)

4 Therefore, in the totality of circumstances, the Corps provided  
5 sufficient opportunity to the public to comment before issuing the EA  
6 and FONSI; and, accordingly, this portion of Defendant's cross motion  
is granted.

7 Conclusion

8 For the reasons stated, Defendants' cross-motion for summary  
9 judgment is granted and BEC's motion is denied. Judgment shall be  
10 entered in favor of Defendants.

11 Dated: January 20, 2009

12   
13 GARLAND E. BURRELL, JR.  
14 United States District Judge

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28